No. 564.

In the Supreme Court of the United States

October Term, 1945.

BOYD L. KITHCART, *Petitioner*,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation, *Respondent*.

PETITION FOR REHEARING OF PETITION FOR CERTIORARI.

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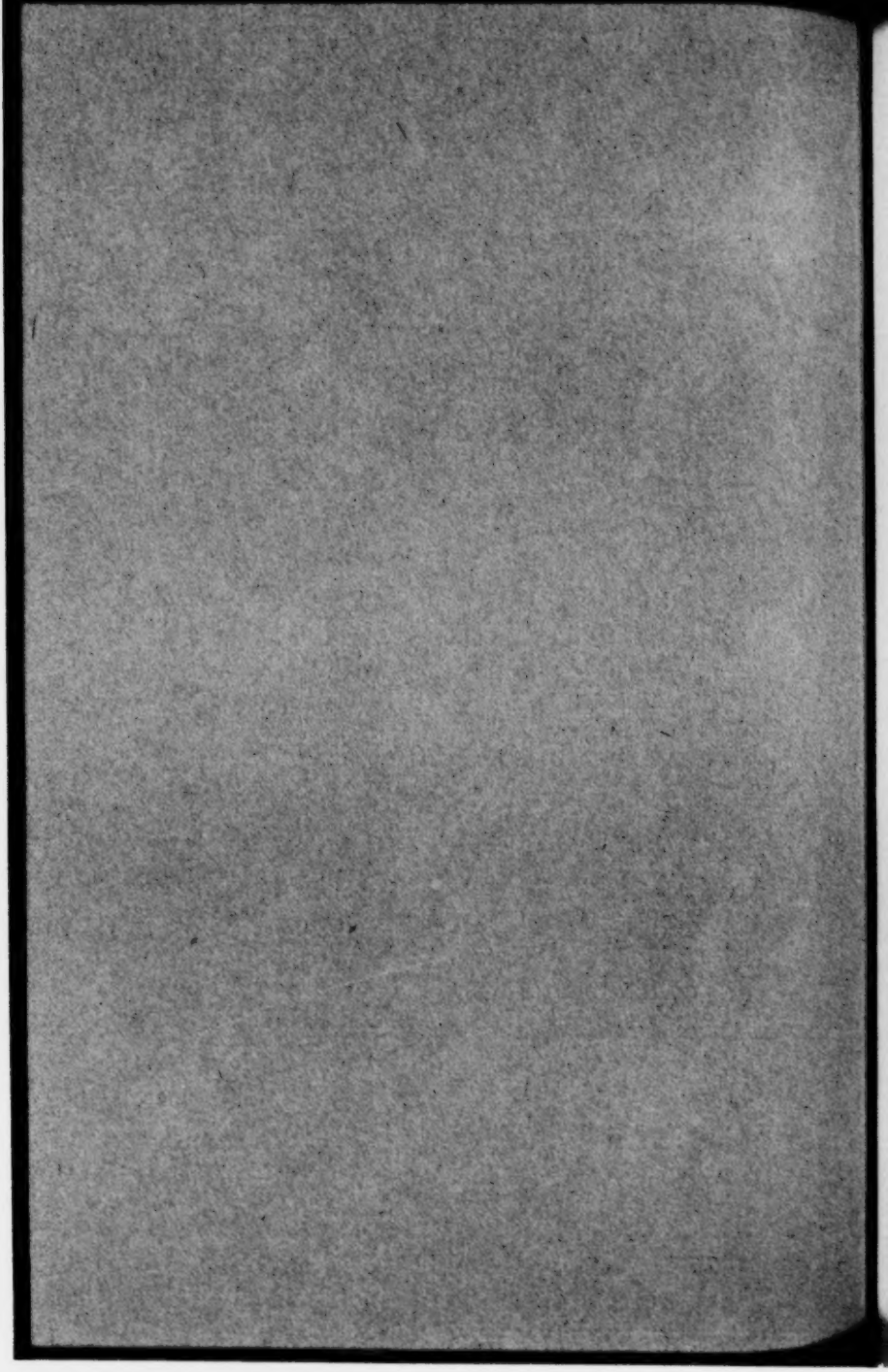

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Now comes petitioner and respectfully prays this Honorable Court to grant him a rehearing herein for the reason that the conflicts between the decisions and opinions of the lower court and the importance of the questions involved with reference to uniformity of the decisions and opinions of the courts necessitates the issuance of the writ.

I.

Because the Circuit Court of Appeals' opinion approved the opinion of the District Judge denying reformation on the ground that the other suits on the policy as it stood

were *res judicata* and said decision is in conflict with the decisions of this Court in *Northern Assurance Co.* v. *Grandview Building Association,* 203 U. S. 106, and *Leithauser* v. *Hartford Fire Insurance Co.*, 316 U. S. 663, denying certiorari in *Leithauser* v. *Hartford Fire Insurance Co.,* 124 Fed. (2d) 117—especially in view of the fact that the Circuit Court of Appeals, after finding that respondent's fraud, coupled with petitioner's mistake, prevented the accrual of the suit for reformation from June, 1929, until May, 1933; and then found that respondent's overt acts in the trial at law, denying knowledge of or possession of the sound risk agreement and denying that its agent, Denison, was employed by it in June, 1929, at the time of the making of the contract, and denying that he had either employment or authority from respondent to negotiate insurance contracts, operated to cause the cause of action for reformation to accrue notwithstanding said acts were merely continuations of the original misrepresentations and further prevented the accrual of said action.

II.

The opinion of the Circuit Court of Appeals stating the Missouri law to the effect that a cause of action for reformation on the ground of mistake accrued on delivery of the policy, but nevertheless postponing the date of the accrual of the right to reform this policy until the trial of the law action in 1933 found that respondent's fraud, as alleged in the petition, preventing the accrual of the cause of action for reformation for nearly four years, and failed to note that the petition alleged that fraud prevented accrual of said cause of action by the representations before the trial, and testimony at the trial, that respondent had no knowledge of the sound risk agreement

which would bind it thereto or make it responsible for the fraud of Denison in negotiating the sound risk agreement. Whereas, under the provisions of the Missouri statute of limitations, Sections 1012, 1013 and 1031, the cause of action for reformation could not accrue by reason of the matters and things which occurred at the trial, for the reason that the acts of the respondent at said trial merely supplemented the fraud, which prevented the action for reformation from accruing before said trial by adding additional misrepresentations to those which had theretofore prevented the cause of action from accruing. That by so doing respondent postponed the accrual of the cause of action for reformation until petitioner discovered on February 25, 1939, that respondent had executed and had knowledge of its sound risk agreement with petitioner. And that the District Court and Circuit Court of Appeals were without jurisdiction to deny to petitioner the protection of Section 34 of the Judicial Act, same being Section 725, Title 28, U. S. C. A., with reference to said statutes of limitation.

III.

Petitioner could have recovered in the state court in which he instituted the action at law to recover on the policy, because under the law of Missouri as applied to insurance contracts the sound risk agreement was admissible in evidence as a waiver of all provisions of said policy eliminated therefrom by the sound risk agreement. The removal enabled respondent to invoke Federal Court law which was different from the Missouri law represented to petitioner and thus defrauded petitioner and prevented the accrual of his action for reformation.

And petitioner respectfully attaches hereto suggestions in support of this motion, from which the said conflicts

more fully appear, and the lack of jurisdiction on the part of the Circuit Court of Appeals and the District Court to render the judgments sought to be reviewed and reversed herein.

Wherefore, petitioner respectfully prays this Honorable Court to reconsider petitioner's petition for certiorari, and on such reconsideration to order the issuance of its writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, as prayed in the petition for same.

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